

PETITION NOT PRINTED

## **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1960**

**No. 174.**

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**NEIL MERLE SMITH, PETITIONER**

**vs.**

**JOHN E. BENNETT, WARDEN**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF IOWA**

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**FILED FEBRUARY 23, 1960  
CERTIORARI GRANTED JUNE 27, 1960**

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[fol. 1]

## EXHIBIT 1

**IN THE DISTRICT COURT OF LEE COUNTY,  
STATE OF IOWA, FORT MADISON**

To: The November Term, A.D. 1959

NEIL MERLE SMITH, PETITIONER

VS.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,  
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

To: the Honorable J. R. Leary, Judge, Lee County District Court, Fort Madison, Iowa.

Your Petitioner, Neil Merle Smith, of the Iowa State Penitentiary, respectfully represents and shows unto your Honor, that he is now imprisoned and restrained of his liberty, by the Warden, John E. Bennett, at the State Penitentiary, Fort Madison, Iowa.

Your Petitioner further represents that the cause or pretense of the said imprisonment and restraint according to his best knowledge and belief is, "ONLY", a warrant of arrest, as issued out of the offices of the Iowa Board of Parole, and under the provisions of Iowa Criminal Statutes Nos. 247-28. Said warrant is absent of this petition, for the reason the petitioner has not had service [fol. 2] OF SAME.

Your Petitioner further brings to the attention of this Court, THE FACT, THERE IS NO MITTIMUS, in this case, as issued out of a Court of Law, For the alleged violation of Iowa Statutes 247-28, 1958 Code of Iowa. And for which the petitioner is presently confined.

Your petitioner further represents that he is not committed or detained by virtue of process of any Court or Judge of the United States. Or is he confined, committed or detained by virtue of process of any Court or Judge of the State of Iowa.

Your petitioner further represents and shows unto your Honor, that the legality of the imprisonment has not already been adjudged upon in a prior proceeding of the same character. And your petitioner further represents, that no petition for Writ of Habeas Corpus has heretofore been made to any Court in the United States District Court, or in the State of Iowa District Court.

Your petitioner further represents and shows unto your Honor that the said imprisonment and restraint, as he is informed and verily believes is illegal and contrary to Law. Wherein it is in direct violation of the petitioners, Iowa, and United States Constitutional rights. And is so shown As:

(1) Contrary to the provisions of Iowa's Constitution, ARTICLE 1, Sec. 9. The right to trial by Jury shall remain inviolate: \* \* \*, But no person shall be deprived of life, Liberty or Property, without due process of law. ARTICLE 1. Sec. 10. \* \* \*, and in cases involving the life, or Liberty of an individual the accused shall have a right to a speedy [fol. 3] and public trial by an impartial jury.

(2) Contrary to the provisions of the United States Constitution. AMENDMENT 6. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the State and District wherein the crime shall have been committed, \* \* \*, nor shall any state deprive any person of Life, Liberty, or property without due process of law, nor deny to any person within its Jurisdiction the Equal Protection of the Law.

Your Petitioner contends and shows unto your Honor, his above rights have been violated in the following manner:

(a) The Iowa Board of Parole, on or about July 21st 1959, did issue a Warrant of arrest for the petitioner, as provided under the provisions of Iowa Criminal Codes. And as provided by the Attorney General opinion 192 at page 316.

(b) On or about July 21st 1959, one Mr. Wilson, Parole agent of the Iowa Board of Parole, did, without Jurisdiction, or Court order, remove the petitioner from the County Jail of Johnson County, Iowa. And did transfer

the petitioner to the State Penitentiary, at Fort Madison, Iowa, without due process of law.

(c) On or about July 21st 1959, the Warden of the Iowa State Penitentiary, John E. Bennett, did accept jurisdiction of the petitioner, from the agent of the Iowa Board of Parole, Mr. Wilson, without order of a Court of Jurisdiction, and in violation of the 14th Amendment of the U. S. Constitution, and its Due Process Clause.

(d) July 25th 1959, 96 Hrs after arrest by warrant, the Warden, and/or the arresting Parole agent of the Iowa [fol. 4] Board of Parole, has made no attempt to return the petitioner, to Johnson County, Iowa, (The County and Court of Jurisdiction, in this case now at bar) and its Court, for arraignment, pleading trial in a Court of Law, and/or trial by Jury. On the alleged violation of law, the cause for this imprisonment.

(e) On this 6th day of November 1959, and after 108 days of confinement, on ONLY, a warrant of arrest. The Warden, John E. Bennett, has arbitrarily, capriciously denied the petitioner the right to be heard in a Court of Law, or the right to trial by Jury. And he, "The Warden", has continued to hold, confine and imprison the petitioner, without conviction. Continued to punish the petitioner to the partial provisions of the criminal codes of Iowa. And continued to punish the petitioner to the provisions of Prison Rule, 71 as though the petitioner had been convicted in a Court of Law.

Your petitioner shows unto your Honor, that allegations, b, c, d and e herein set out are in direct violation of the United States Constitution, under the 5th, 6th and 14th Amendment. And therefore are in direct violation of the Petitioner's Constitutional rights.

IT IS THEREFORE, your petitioner respectfully Prays, that a Writ of Habeas Corpus may issue, to the respondent, John E. Bennett, Warden, of the Iowa State Penitentiary, at Fort Madison, Iowa. And returnable forthwith, in order that your Honor may inquire into the cause or pretense of the said committment, imprisonment and restraint. As provided by Law, and discharge your peti-

4  
[fol. 5] tioner out of custody of the Warden, John E. Bennett.

Respectfully Submitted

/s/ Neil Merle Smith  
NEIL MERLE SMITH, Petitioner  
pro se  
Box 316,  
Fort Madison, Iowa.

STATE OF IOWA )  
COUNTY OF LEE ) ss:

I, /s/ Neil Merle Smith, being first duly sworn on oath deposes and says that I am the Petitioner in the foregoing petition for Writ of Habeas Corpus, and the statements and averments above made are true to the best of my knowledge and belief.

/s/ Neil Merle Smith  
NEIL MERLE SMITH

Subscribed and sworn to before me, RALPH D. MOEHN, a Notary Public in and for Lee County, State of Iowa, this 9th day of November, 1959, by Neil Merle Smith, who is personally known to me to be the petitioner herein.

/s/ Ralph D. Moehn,  
RALPH D. MOEHN,  
Notary Public, Lee County,  
State of Iowa.

MY COMMISSION EXPIRES  
JULY 4th 1960.

NOTARY SEAL



[fol. 6]

## EXHIBIT 2

IN THE DISTRICT COURT OF LEE COUNTY,  
STATE OF IOWA, FORT MADISON

NEIL MERLE SMITH, PETITIONER

VS.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,  
RESPONDENTMOTION TO ALLOW PETITION FOR WRIT OF HABEAS CORPUS  
"IN FORMA PAUPERIS"

Comes now the petitioner, above named, and in his own person moves this Court, to allow and file the attached petition for writ of habeas corpus, in the Lee County District Court, Fort Madison, Iowa. And allow said petition to be filed, in Forma Pauperis, on and by the authority of the affidavit of poverty attached hereto and made part of this motion.

Respectfully Motioned

/s/ Neil Merle Smith  
NEIL MERLE SMITH, Petitioner .  
Box 316,  
Fort Madison, Iowa.



[fol. 7]

## EXHIBIT 3

IN THE DISTRICT COURT OF LEE COUNTY,  
STATE OF IOWA, FORT MADISON

## AFRIDAVID OF POVERTY

COUNTY OF LEE.)  
STATE OF IOWA )

SS:

I, Neil Merle Smith, having been first duly sworn according to Law, do claim that I am with out funds or property, and without sufficient funds to pay the filing fee, and perfect this matter of petition for Writ of Habeas Corpus, now before this Court, It Is THEREFORE, the petitioner prays the Lee County District Court, and the Honorable J. R. Leary, Judge, to allow and file the said attached petition without the required filing fee.

/s/ Neil Merle Smith  
NEIL SMITH, Petitioner.

Subscribed and sworn to before me this 9th day of November, 1959, at Fort Madison, Iowa.

/s/ Ralph D. Moehn,  
RALPH D. MOEHN, Notary Public  
in and for Lee County, State of  
Iowa, Fort Madison.

MY COMMISSION EXPIRES  
JULY 4th 1960.

NOTARY SEAL

[fol. 8]

## EXHIBIT 4 .

IN THE DISTRICT COURT OF LEE COUNTY,  
STATE OF IOWA, FORT MADISONMarriage-Probate-District Court-Birth-Death-Criminal  
Records Since 1837

## CLERK OF THE DISTRICT COURT

Lee County, Iowa

November 14, 1959

Lyle B. Miller, Clerk  
Keokuk  
Phone 29Mary McMurry, Deputy  
Fort Madison  
Phone DRake 2-3523Neil Merle Smith  
#24871  
Box 316  
Fort Madison, Iowa.

Dear Sir:

I am reutrning your "Motion to allow petition for Writ  
of Habeas Corpus Informapauperis".

If you will mail this office \$4.00 to cover filing fee for  
the above, it will be presented to Honorable W. L.  
Huiskamp.

Very truly yours

/s/ Mary McMurry  
MARY McMURRY  
Deputy Clerk District Court

Enc.

## EXHIBIT 5

[fol. 9]

(File Endorsement Omitted)

IN THE SUPREME COURT OF THE  
STATE OF IOWA

NEIL MERLE SMITH, APPELLANT

VS.

JOHN E. BENNETT, Warden, Iowa State Penitentiary,  
APPELLEEMOTION FOR LEAVE TO APPEAL "IN FORMA PAUPERIS"—  
Filed November 24, 1959

Comes now the Appellant, above named, and moves this Court to permit the Appeal in the above entitled cause, to be prosecuted to the Iowa Supreme Court, from the order November 14, 1959, of the Clerk of the Lee County District Court, "Mrs. Mary McMurry", denying to file the Appellants Motion to the Lee County District Court.

The Appellant further moves this Court, to permit the Appellant to perfect this Appeal to the Provisions of Iowa Rules of Civil Procedure, 342, (a) (b) (c) (d), R. C. P. 343 343 344 345 346, and all other provisions required by the Iowa Supreme Court, IN FORMA PAUPERIS, On and by the authority of the Affidavit of Poverty attached hereto and made part of this Motion.

(s) Neil Merle Smith,  
Pro se.  
Box 316  
Fort Madison, Iowa.

[fol. 10]

## EXHIBIT 6

IN THE SUPREME COURT OF THE  
STATE OF IOWACOUNTY OF LEE )  
STATE OF IOWA ) SS.

Herein I, Neil M. Smith, do hereby state upon oath and deposes the following:

I am a Citizen of the United States, and of legal age, and otherwise qualified to make this affidavit.

I am without funds to pay costs of having records, brief and arguments printed in appellate procedure to the Supreme Court of Iowa, and am further unable to pay costs or fees, in connection with filing and prosecuting an Appeal to the Supreme Court of Iowa to seek the redress to which I believe I am entitled by proceeding in Habeas Corpus. I am without property or possessions, personal or otherwise, or means to obtain funds for payment of costs of this action, nor am I able to give security thereof.

This affidavit is made in good faith for the purpose of securing the redress to which I believe I am entitled in Habeas Corpus proceeding, and which, because of poverty, I am unable to prepay or give security for said costs. All statements contained herein are true and correct to the best of my knowledge and belief.

(s) Neil Merle Smith, Appellant

Subscribed and sworn to before me this 20th day of November, 1959.

(s) Ralph D. Moehn,  
Notary Public Lee County,  
State of Iowa.

My commission expires  
July 4th, 1960 (SEAL)

[fol. 11]

## EXHIBIT 7

IN THE SUPREME COURT OF THE  
STATE OF IOWA

BE IT REMEMBERED, That on the 15th day of December,  
1959, the following proceedings were had, to-wit:

Appeal from Lee District Court

## ORDER

NEIL MERLE SMITH, APPELLANT

VS.

JOHN F. BENNETT, Warden, Iowa State Penitentiary

Motion for leave to appeal from order of Clerk of Lee  
County District Court Denied, by the court.

THE SUPREME COURT OF IOWA

(s) R. A. Oliver, Judge.

I hereby certify that the foregoing is a full, true and  
complete copy of the order made by said Court in the  
above entitled cause, as full, true and complete as the  
same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set  
my hand and affixed the seal of said Court, at  
Des Moines, this 16th day of December, A.D.  
1959.

/s/ Helen M. Lyman, Clerk.

By

Deputy.

[fol. 12]

## CLERK'S CERTIFICATE

I hereby certify that the foregoing is a full, true and complete copy of the "MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS" and ORDER of court filed December 16th, 1959 denying the Motion for leave to appeal, as full, true and complete as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, Iowa, this 9th day of August, A. D., 1960.

/s/ Helen M. Lyman, Clerk.

(SEAL)

[fol. 13]

IN THE SUPREME COURT  
OF THE UNITED STATES

No. 174, October 1960 Term

SMITH, PETITIONER

v.

BENNETT, WARDEN

STIPULATION—July 26, 1960

It is hereby stipulated by and between Norman A. Erbe, Attorney General of the State of Iowa, counsel for the respondent, John E. Bennett, Warden, and Luther L. Hill, Jr., attorney for the petitioner, Neil Merle Smith, that the record in the above entitled action shall consist of the following documents, copies of which are attached hereto:

Exhibit 1. Petition for writ of habeas corpus in the District Court of Lee County, Iowa, entitled, Neil Merle Smith, Petitioner, v. John E. Bennett, Warden.

Exhibit 2. Motion in Lee County, Iowa, District Court to allow petition for writ of habeas corpus in forma pauperis.

Exhibit 3. Affidavit of poverty, dated November 9, 1959, filed in Lee County, Iowa, District Court.

Exhibit 4. Letter from Mary McMurry, Deputy Clerk of the District Court in and for Lee County, Iowa, dated November 14, 1959, addressed to Neil Merle Smith.

Exhibit 5. Motion for leave to appeal in forma pauperis filed in the Supreme Court of Iowa on November 24, 1959.

Exhibit 6. Affidavit in support of said motion filed in Supreme Court of Iowa on November 24, 1959.



Exhibit 7. Order of the Supreme Court of the State of Iowa dated December 15, 1959.

[fol. 14]

[init] N.A.E. by M.R.N.

L. L. Hill, Jr. by R.A.C.

Dated at Des Moines, Iowa, this 26th day of July, 1960.

/s/ Norman A. Erbe  
NORMAN A. ERBE, Attorney General  
of the State of Iowa, Attorney for  
the Respondent, John E. Bennett

/s/ Luther L. Hill, Jr.  
LUTHER L. HILL, Jr., Attorney for  
Petitioner, Neil M. Smith

[fol. 15]

Marriage-Probate-District Court  
Birth-Death-Criminal  
Records Since 1837

CLERK OF THE DISTRICT COURT  
Lee County, Iowa

August 11, 1960

Lyle B. Miller, Clerk  
Keokuk  
Phone 29

Mary McMurry, Deputy  
Fort Madison  
Phone DRake 2-3523

Mr. Ralph A. Church  
c/o Henry & Henry, Lawyers  
Equitable Building  
Des Moines 9, Iowa

Inre: Smith vs. Bennett, Warden

Dear Mr. Church:

I have before me your letter of August 9th, 1960, stating that you are a partner of Mr. Luther L. Hill, Jr. who was appointed attorney for Neil Merle Smith in his Petition against John E. Bennett, Warden of the Iowa State Penitentiary by the Supreme Court of the United States; that Mr. Hill is on his vacation; that, in his absence, you have received a letter from the Clerk of the United States Supreme Court, returning the stipulation entered into by Mr. Hill and the Iowa Attorney General relating to the record; that the United States Supreme Court Clerk requests that various documents attached to the stipulation be certified by the Clerk of this Court and the Clerk of the Supreme Court of Iowa as true copies.

The only papers that I have in my office relating to this matter are not of record and are a copy of my letter of November 27, 1959, addressed to Mr. Marion R. Neely, Assistant Attorney General; the letter of Mr. Smith, addressed to me, dated November 19, 1959 containing documents Mr. Smith identified as a Notice of Appeal from the Order of the Clerk of this Court (of course, there is no such Order); a letter from Mr. Smith to this office, dated November 16, 1959; a copy of my letter to Mr.

Smith dated November 20, 1959; the original of Mr. Smith's letter to this office, dated November 5, 1959; a copy of my letter to Mr. Smith dated November 14, 1959; a copy of the letter of the County Attorney of Lee County to Mr. Marion R. Neely, Assistant Attorney General, dated December 23, 1959. Since none of these papers are of record, it is impossible for me to certify to any of them.

I find it impossible to certify to your enclosed copies of Petition for writ of habeas corpus, Motion to Allow Petition for writ of habeas corpus, affidavit of poverty and a copy of my letter to Mr. Smith, dated November 14, 1959 because none of these matters are of record in my office. When a filing fee is not paid for the filing of a Petition other than in a criminal case, I am not permitted under the law to file the same and, therefore, there is no record kept in the matter. I am sending a copy of this letter to Mr. Marion R. Neely, Assistant Attorney General, for his information and if he has any suggestions or directions to this office, we will be glad to receive them. This letter is being written under the advice of the County Attorney of Lee County, Iowa.

Very truly yours,

/s/ Mary McMurry

Deputy Clerk of the District Court

cc: Mr. Marion R. Neely

[fol. 16] SUPREME COURT OF THE  
UNITED STATES

No. 785 Misc., October Term, 1959

NEIL MERLE SMITH, APPELLANT

VS.

JOHN E. BENNETT, WARDEN

APPEAL from the Supreme Court of the State of Iowa.

ORDER DISMISSING APPEAL AND GRANTING PETITION FOR  
WRIT OF CERTIORARI—June 27, 1960

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss,

ON CONSIDERATION WHEREOF, It is ordered by this Court that the motion to dismiss the appeal herein be, and it is hereby, granted.

IT IS FURTHER ORDERED that the appeal herein be, and it is hereby, dismissed.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted limited to the question decided in *Burns v. Ohio*, 360 U.S. 252. The case is transferred to the appellate docket as No. 1034 and consolidated for hearing with Nos. 446 Misc. and 515 Misc. A total of two hours is allowed for the argument of these cases.

June 27, 1960

[fol. 17] SUPREME COURT OF THE  
UNITED STATES

No. 785 Misc., October Term, 1959

NEIL MERLE SMITH, APPELLANT

VS.

JOHN E. BENNETT, WARDEN

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA  
PAUPERIS—June 27, 1960

ON CONSIDERATION of the motion for leave to proceed  
herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be,  
and the same is hereby, granted.

June 27, 1960